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ATTORNEY FOR APPELLANT:

**TERESA D. HARPER**  
Bloomington, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**MICHAEL GENE WORDEN**  
Deputy Attorney General  
Indianapolis, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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RALPH K. ELAM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0602-CR-81
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 4  
The Honorable Patricia J. Gifford, Judge  
The Honorable Amy Barbar, Magistrate  
Cause No. 49G04-0506-FB-106170

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**March 14, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Following a two-phase jury and bench trial, Defendant-Appellant, Ralph Elam, challenges his conviction and sentence for Robbery as a Class C felony<sup>1</sup> and the trial court's determination finding him to be a habitual offender. He received an aggregate sentence of twelve years in the Department of Correction. Upon appeal, Elam claims (1) that the trial court abused its discretion by admitting into evidence a certain pair of jeans which Elam was wearing the day of arrest, and (2) that a photo array used to identify Elam was impermissibly suggestive so as to constitute fundamental error.

We affirm.

On June 9, 2005, a National City Bank branch located at 4555 Allisonville Road in Indianapolis was robbed. According to Noel Salas, who was employed as a teller there, a man approached her at approximately 3:00 p.m. and leaned over the counter, handed her a bag, told her to fill it with money, and threatened to shoot her. Salas testified that she took the bag to her drive-up window and filled it with money from her top drawer. Salas also testified she put a dye pack of money in the bag and handed it back to the robber. According to Salas, the robber then showed her a gun and left the bank. Salas described the robber at trial as 5'11", heavy-set or husky, with short hair cut close to his head, and wearing a red T-shirt. Upon cross-examination, Salas admitted having earlier described the robber as 5'6" but indicated this estimate was due to his leaning over the counter. Salas also testified that she took special note of his eyes as she had been trained to do.

Shirlinda Millbrook testified that she held a managerial position at this National City Bank branch and was working at another teller station approximately five to six feet

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<sup>1</sup> Ind. Code § 35-42-5-1 (Burns Code Ed. Repl. 2004).

away from Salas when the robbery occurred. According to Millbrook, who saw the would-be robber walk into the bank, she took note of him as he spoke with Salas because his voice was raised, although Millbrook did not pay attention to what he said, and Salas did not signal that she needed help. Millbrook testified that the robber was wearing a red T-shirt and dark jeans. She further testified that he did not have hair on his face, that he had a “short afro,” and that his eyes were shaped like almonds and “kind of drooped.” Tr. at 59. Millbrook also apparently took note of the robber’s “brown skin” and testified that he was about 5’10” to 5’11” tall and weighed approximately 250 to 280 pounds. Tr. at 59. After the robber left the bank and Millbrook was informed of the robbery, she went to the door and observed that the dye pack inside the bag of money had exploded while the robber was in the parking lot, and it appeared that the robber was trying to go through the bag of money, which she claimed he subsequently dropped because the paint was “all over.” Tr. at 64.

Indianapolis Police Detective Leon Benjamin responded to the June 9, 2005 robbery report. He interviewed both Salas and Millbrook and others who were present at the time of the robbery, and he obtained surveillance pictures, which he then distributed to various news media. Based upon tips responding to the broadcast of the robbery pictures, Detective Benjamin created a photographic array including Elam’s picture and pictures of five additional African-American males with features similar to Elam’s.

On June 16, 2005, Indianapolis Police Detective Leon Benjamin met separately with Salas and Millbrook and showed them the photographic array. Both Salas and Millbrook picked Elam out of the array and identified him as the robber. Millbrook

testified that she and Salas did not discuss their conclusions with one another prior to either of their identifications. Detective Benjamin also presented the array to another bank employee as well as to a customer who was present the day of the robbery, neither of whom was able to identify the robber from the array. At trial, both Salas and Millbrook identified Elam again as the robber.

Detective Benjamin submitted a fingerprint found on the door of the bank to the Indianapolis Police Department for testing. Elam's fingerprint did not match the fingerprint found at the scene. Based upon the tips in response to the media broadcast of the robbery surveillance pictures and Salas's and Millbrook's identification, Benjamin obtained an arrest warrant for Elam.

On June 22, 2005, Elam was charged with robbery, unlawful possession of a firearm by a serious violent felon, and carrying a handgun without a license. On August 31, 2005, the State filed an information alleging Elam to be a habitual offender. In response to Elam's motion for a multi-part trial, which the trial court granted, the State filed a subsequent information on November 30, 2005, enumerating as Counts I and II the charges for robbery and carrying a handgun without a license.<sup>2</sup>

Elam was arrested on July 16, 2005. Approximately four to five months after Elam was arrested, Detective Benjamin obtained the jeans Elam was wearing the day of his arrest. According to Detective Benjamin, Elam surrendered his jeans to the Marion

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<sup>2</sup> No issue is raised as to whether the habitual offender charge was still before the court following the amended information regarding the charges of robbery and carrying a handgun without a license which were enumerated Counts I and II in the amended information. We note, however, that original Count II, unlawful possession of a firearm by a serious violent felon, remained unaffected by the amended information and was dismissed by the State following the jury acquittal on the carrying-a-handgun charge.

County Jail, which logged them in under his July 2005 arrest date and kept them in a property room. Detective Benjamin testified he obtained the jeans by going to a property room at the jail and asking for Elam's property, which was handed to him in a sealed bag. Detective Benjamin took only the jeans.

Prior to trial, defense counsel filed a motion in limine seeking to exclude Elam's jeans on the basis that none of the State's witnesses had expertise in identifying the red marks on the pants, and that such evidence would therefore be substantially more prejudicial than probative. The trial court denied this motion. At trial defense counsel again objected to admission of the pants on foundational and chain-of-custody grounds. The trial court overruled counsel's objection.

The jeans were introduced at trial as State's Exhibit 11. National City Bank security administrator, Jack Gillespie, testified that the jeans contained areas of red spots which were consistent with paint splatter such as that from a dye pack, some of which appeared to have been partly washed off. Detective Benjamin conceded that he did not test the spots and had no evidence to support the claim that the red marks on the jeans was paint from the dye pack.

The photographic array and Salas's and Millbrook's identifications from it were also introduced at trial. Defense counsel made no objections to this evidence.

Elam was convicted by the jury of robbery as a Class C felony. At a subsequent bench trial the court found Elam to be a habitual offender. At a January 18, 2006 sentencing hearing, Elam was sentenced to six years in the Department of Correction, enhanced by another six years due to the court's habitual offender finding.

Upon appeal, Elam claims the admission into evidence of his jeans, State's Exhibit 11, was an abuse of discretion and also that the photographic array used to identify him as the robber was impermissibly suggestive and constituted fundamental error.

In addressing Elam's challenge to the admission of State's Exhibit 11 into evidence, we first note, as the State argues, that Elam challenged this evidence at trial upon foundational and chain-of-custody grounds but argues upon appeal that it is inadmissible as "irrelevant, highly prejudicial, and compromised by an inadequate chain-of-custody record." Appellant's Brief at 7. It appears, however, that the trial court ruled upon Elam's objections on relevancy grounds. We will therefore respond to Elam's challenges based upon the relevance and prejudicial effect of State's Exhibit 11, which are the only challenges Elam develops in his brief.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Sandifur v. State, 815 N.E.2d 1042, 1047 (Ind. Ct. App. 2004) (quotation omitted) (quoting Ind. Evidence Rule 401), trans. denied. Generally speaking, relevant evidence is admissible, and irrelevant evidence is inadmissible. Id. at 1048 (citing Ind. Evidence Rule 402). However, relevant evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Id. (citing Ind. Evidence Rule 403). A decision concerning relevance and prejudice is within the sound discretion of the trial court, and its decision is afforded a great deal of deference upon

appeal. Id. We will reverse a trial court only upon a showing that the trial court manifestly abused its discretion and the defendant was denied a fair trial. Id.

Here, Elam specifically contends that the jeans introduced as State's Exhibit 11 were light blue, not "dark" as Millbrook testified and as Elam claims the surveillance footage shows. Elam further contends that no witness could testify to any personal knowledge or test regarding where the red spots on the jeans had come from and what their substance was.

We are not convinced that the trial court's admission into evidence of State's Exhibit 11 constituted an abuse of discretion based upon these claims. Eyewitness accounts indicated the robber wore jeans and that the red dye pack exploded while in his possession. Eyewitness accounts further identified Elam as the robber. The fact that Elam, upon being arrested, was found wearing jeans which appeared to have red spots on them is of consequence to the State's claim that Elam was the robber, as it provides additional evidence, together with eyewitness identifications, tending to connect Elam to the crime.

Further, the fact that Elam owned a pair of jeans with red spots on them was not so inherently prejudicial, confusing or misleading that the jeans' probative value would have been substantially outweighed. As a matter of common sense, the jury would have been aware of any number of innocent explanations for owning blue jeans with red spots on them, and defense counsel was free to point out, as she did, that the State provided no expert evidence or test tending to suggest that the spots on the jeans were the red dye from the dye pack or that the jeans in Exhibit 11 were the reportedly "dark" ones worn by

the robber. We are not convinced that the fact of blue jeans with red spots on them would have been so shocking, confusing, or misleading such that the jury's objective consideration of them would have been compromised. We therefore find no abuse of discretion by the trial court on Indiana Rule of Evidence 403 grounds in admitting Exhibit 11 into evidence.

To the extent Elam challenges the evidence on chain-of-custody grounds, we conclude that this claim is without merit. There is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties. Bussberg v. State, 827 N.E.2d 37, 42 (Ind. Ct. App. 2005), trans. denied. One must present evidence that does more than raise a mere possibility that the evidence may have been tampered with to mount a successful challenge to the chain of custody. Id. At trial, Elam did no more than suggest the possibility that there may have been a problem with the chain of custody, and he does not develop this argument upon appeal. An appellant must present a cognizable argument supported by authority for us to consider it upon appeal. See Ind. Appellate Rule 46(A)(8)(a).

Elam's second challenge upon appeal is a claim of fundamental error premised upon what he claims was an impermissibly suggestive photographic array. The fundamental error exception to the waiver rule is an extremely narrow one. Glottzbach v. State, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant as to clearly taint the fairness of a trial. Id. at 1226. Specifically, the error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial,



and the resulting error must deny the defendant fundamental due process.’” Id. (quoting Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)).

We first observe our prior holdings that the admission of allegedly tainted identification evidence does not constitute fundamental error. Hyppolite v. State, 774 N.E.2d 584, 595 (Ind. Ct. App. 2002) (citing Miles v. State, 764 N.E.2d 237, 239 (Ind. Ct. App. 2002), trans. denied). Elam argues that such a categorical rule does not apply under the circumstances of this case where the admission of the identification evidence represents what he alleges was a violation of his due process rights. While it is arguable that a due process violation resulting in the only evidence of a defendant’s guilt may rise to the level of fundamental error, we are not faced with this circumstance in the case at hand.

Nevertheless, on the merits we observe that the Due Process Clause of the Fourteenth Amendment requires suppression of testimony concerning a pre-trial identification when the procedure employed is impermissibly suggestive. Swigert v. State, 749 N.E.2d 540, 544 (Ind. 2001). A photographic array is impermissibly suggestive if it raises a substantial likelihood of misidentification given the totality of the circumstances. Id. A pre-trial identification may occur in a manner so suggestive and conducive to mistaken identification that permitting a witness to identify a defendant at trial would violate the Due Process Clause. Id. A trial court considers certain factors to evaluate the likelihood of a misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; and (4) the level of certainty

demonstrated by the witness. Williams v. State, 774 N.E.2d 889, 890 (Ind. 2002). If the pre-trial identification procedure was unduly suggestive, then testimony relating to it is inadmissible. Id. A photographic array is sufficient, however, if the defendant “does not stand out so strikingly in his characteristics that he virtually is alone with respect to identifying features.” Harris v. State, 716 N.E.2d 406, 410 (Ind. 1999) (quotation omitted).

Elam claims the photographic array was impermissibly suggestive because it showed him wearing a red T-shirt, as the robber had been described as wearing by both Salas and Millbrook. Elam points to witness identification discrepancies in the robber’s reported height and amount of facial hair and argues that the red T-shirt, which Elam is wearing in the photographic array, is the only consistent characteristic from the witness reports and therefore makes the array impermissibly suggestive.

We first observe that while Elam is the sole individual in the array wearing a red T-shirt only, another individual is similarly wearing a red shirt which is clearly visible and only partially obscured by his jacket. We also note that all individuals in the array are African-American males with short-cut hair and some degree of facial hair, all of whom have roughly the same facial expression and could be described as stocky; that all of the backgrounds in the photographs are similar; and that nothing appears to make any one picture stand out from any other. It is important to note also that there was no suggestion at trial, nor is there now, that Detective Benjamin made improper comments to the witnesses viewing the array or that the witnesses made improper comments to one another either before or after making their identifications. Indeed all evidence was to the

contrary that Detective Benjamin did not make any improper statements and that the witnesses did not consult one another prior to making their identifications.

Regarding the likelihood of a misidentification, we note that Salas was face-to-face with the robber; that she studied his eyes and had been trained how to make identifications; that with the exception of height, which was not a factor in the photo array, her description was not inconsistent; that she identified Elam in the array immediately and with a stated degree of confidence; and that her identification was based upon Elam's eyes.

While there was a greater likelihood of misidentification in Millbrook's case than in Salas's, Millbrook too had a basis for making an accurate identification: she greeted the robber as he entered the bank; she took additional note of him while he was speaking to Salas; and her stated identification was based largely upon her memory of the distinct features of his eyes.

Further still, both Salas and Millbrook made in-court identifications of Elam. A witness who participates in an improper pretrial identification procedure may still identify a defendant in court if the totality of the circumstances shows clearly and convincingly that the witness has an independent basis for her in-court identification. Swigart, 749 N.E.2d at 544. Based upon the totality of the circumstances, we conclude that both Salas and Millbrook, who used their training to make studied observations of the robber in the middle of the day at a well-lighted bank and who identified him one week later from the photo array, had an independent basis for their in-court identifications.

Given the low likelihood of Salas's and Millbrook's misidentification and the independent bases for their in-court identifications, we are not convinced that the red T-shirt makes the array impermissibly suggestive.<sup>3</sup> It certainly does not do so on the level required to constitute fundamental error.<sup>4</sup>

Having determined that the trial court did not abuse its discretion in admitting State's Exhibit 11 and that no fundamental error was caused by the photo array, we affirm Elam's robbery conviction.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

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<sup>3</sup> We arrive at this conclusion even in light of the witness identification discrepancies in height and facial hair, as height is not a relevant factor in photographic arrays, and facial hair is constantly changeable and would not be the sole basis upon which an identification would be made.

<sup>4</sup> Elam cites to Israel v. Odom, 521 F.2d 1370, 1374-76 (7th Cir. 1975) as authority for the proposition that photographic arrays or line-ups in which defendants are wearing distinctive clothing or are otherwise the only participants wearing distinctive clothing matching important elements of the description provided by the victim substantially increase the dangers of misidentification. We note that although the court found the lineup in Israel suggestive because the defendant was the only one wearing glasses, which was the outstanding feature of his appearance according to the victim, it nevertheless determined that the victim's identification was adequately reliable such that there was no deprivation of the defendant's due process rights. Id. Here, Elam was not the only person in the array wearing a red shirt, both witnesses testified that his distinguishing characteristic was his eyes, and the totality of the circumstances showed a low probability of misidentification. We are unpersuaded that Israel stands as authority for finding the photographic array in this case was in violation of Elam's due process rights.